Case No. 15035

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERMOUNTAIN EQUIPMENT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER INTERMOUNTAIN EQUIPMENT COMPANY

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INDEX

CASES CITED

TEXTS CITED

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It is the purpose of the petitioner in this reply brief to call to the Court's attention certain inaccuracies of the factual statements contained in the brief of the respondent National Labor Relations Board. The Board asserts that the contract negotiated between the company and the union, except for an hourly wage increase, did not provide benefits to the employees covered thereby which they had not previously enjoyed (Respondent's brief, page 7). This, of course,

is not true. The contract, in addition to an increase in wages provided for (1) overtime after eight hours in any one day; (2) guaranteed paid vacations; (3) six paid holidays with the provision for pay at time and one-half for work performed on holidays, with the further provision that holidays not worked should count as time worked for purposes of computing weekly overtime; (4) and the further benefits of union security, seniority provisions, and grievance processing machinery, none of which benefits had been guaranteed prior to the contract and none of which benefits has ever been guaranteed to those of the company's employees not in the unit even to the present date.

The Board asserts that many of the unrepresented employees received individual merit increases and no such increases were received by the represented employees (Respondent's brief, page 7). The record does not support this assertion. It should be noted that the contract covering the employees in the unit provides for an automatic increase of twenty cents per hour for all employees in the unit after a six months probationary period (R. 106). There is no evidence in the record to support the Board's assertion that many of the unrepresented employees received merit increases, whereas the represented employees did not receive such increases. This assumption is actually contrary to the facts, as several of the employees in the unit have received merit increases, and it should be noted that the contract establishes minimum rates and expressly recognizes that the employees covered thereby may receive more than those minimums. (R. 104).

The gist of the Board's argument seems to be that the alleged violation of the act consists not in the fact that the employees in the unit were treated differently than those employees not in the unit with regard to bonuses and sick leave, but in the fact that the company failed to give the employees in the unit any reason for such disparate treatment (Respondent's brief, page 11). It seems to us that this argument of the Board suggests something in the nature of a "refusal to bargain". However, it should be noted that although the company was originally charged with refusing to bargain in violation of Section 8 (a) (5) of the Act, the Trial Examiner expressly found that there had been no such refusal and accordingly dismissed that portion of the complaint (R. 61, 63). The Board places great emphasis on the alleged assurances of the company during negotiations that the company would not discriminate between those of its employees within and without the unit and states that these alleged assurances induced the union to drop those demands for contractual provisions covering bonuses and sick leave. This argument sounds like something akin to fraud in the inducement and again appears to be an indirect way of accusing the company of a refusal to bargain even though the Trial Examiner found and the Board affirmed that there was no such refusal.

What the Board obviously is doing in this case is to obtain for the employees in the unit benefits which the union failed to obtain for those employees at the collective bargaining table. This we submit the Board cannot lawfully do. The Act does not re-

quire and the Board cannot compel parties to collective bargaining negotiations to reach agreements on any given issue or set of issues. As Chief Justice Hughes said in speaking for the United States Supreme Court in the case of *N.L.R.B.* vs. *Jones and Laughlin Steel Corporation* (U. S. Sup. Ct. 1937) 31 U. S. 1:

> "The Act does not compel agreements between the employers and employees. It does not compel any agreement whatever. It does not prevent the employer from 'refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ***". (Ibid 1 LRRM at page 713).

The Board argues that the company did not in fact establish that the contractual provisions caused it added expense or provided added benefits to the employees covered thereby, which expense and benefits did not run to the company's unrepresented employees. The Board further argues that the effect of the twenty-six cents an hour wage increase granted to the employees in the unit was nullified by a reduction in the number of hours worked per week. This argument is so absurd in the face of fundamental economic principle that we wonder if the Board can make the same in good faith. It seems reasonably clear that an employer suffers an economic burden just as clearly when he pays the same amount of money for less work as when he pays more money for the same amount of work. In other words, an employer's labor cost increases if he reduces the number of hours worked while maintaining the same take-home pay

just as clearly as his labor cost increases when he increases the take-home pay while maintaining the same number of hours worked. Unless there is a corresponding increase in productivity(and the record is devoid of such a suggestion) the company here suffered an economic burden when it granted a twenty-six cents an hour increase even though the work week was subsequently reduced.

Contrary to the Board's assertion there is no evidence in the record to show that the employees not in the unit benefited by a reduced work week. On the contrary the record shows that there was no such reduction in the work week of many, if not most, of the employees not represented by the union.

The Board brushes aside as being without merit the company's contention that conceivably it could have been guilty of an unfair labor practice had it paid its represented employees bonuses in addition to the benefits spelled out in the contract. Since the Act makes it just as much a violation to *encourage* as to *discourage* union membership, and since the Board argues that the disparate treatment with regard to bonuses inherently must discourage union membership, then to be consistent the Board must also take the position that if the company had paid bonuses to all of its employees in the unit and had not paid bonuses to those of its employees not in the unit, the company would thereby be guilty of a violation of Section 8 (a) (1) and (3) of the Act because such conduct would inherently *encourage* those unrepresented employees to join the union.

We submit that the record is clear in this case (contrary to the Board's assertion, Respondent's brief page 20, footnote) that the unrepresented employees received no benefits or promise of benefits which tended in any degree to equalize the increases granted to the employees in the unit by virtue of the contract. We submit that this case is on all fours with the facts in the case of *N.L.R.B.* vs. *Nash Finch Company* (CA 8th 1954) 211 F.2d 622, and is not distinguishable as the Board suggests.

We should further like to call to the attention of this Honorable Court the fact that heretofore the Board has had no difficulty in justifying disparate treatment between various collective bargaining units of employees as distinguished from disparate treatment of employees within the same unit. Indeed the Board has explained the decision of the United States Supreme Court in *Radio Officers Union* vs. *N.L.R.B.*, 347 U. S. 17, in this manner. In its decision in the case of Anheuser-Busch, Inc. (N.L.R.B. 1955) 112 N.L.R.B. No. 91, 36 LRRM 1086, the Board said in referrring to the *Radio Officers* case:

> "It is this specific application of the general principles enunciated by the Supreme Court that is most significant. In stating that 'specific proof of intent is unnecessary where an employer's conduct inherently encourages or discourages union membership,' the Court, it seems plain, was mindful of factual circumstances where disparity of treatment *inherently* encourages or discourages union membership. In Gaynor, for example, the payment of different wages to union employees doing a job than to nonunion employees doing the *same job* obviously

had that reasonably foreseeable effect. Where, however, the employer's conduct does *not* 'inherently' encourage or discourage union membership, it seems clear to us that the necessity for independent evidence of discriminatory motivation is *not* obviated, and in the light of this, the Court's statement that 'Congress intended the employer's purpose in discriminating to be controlling' becomes significantly meaningful." (36 LRRM at page 1088).

It seems to us that where all of the employees in the unit are treated alike even though employees in a different unit (or who could not properly come within the unit) are treated differently, this disparate treatment cannot properly be characterized as an unfair labor practice in the absence of some showing of an unlawful motive or intent. To hold otherwise is to say that an employer's intent is unimportant in discrimination cases, which in turn requires the overruling of well established law to the contrary.

The Board's decision in this case, and its argument in its brief in support thereof, as it pertains to bonuses and sick leave is in our opinion contrary to the Jones and Laughlin case, supra; and further, to sustain such doctrine as enunciated by the Board is to establish a precedent that the Board may make a contract for the parties. It must be remembered that the Trial Examiner found that there was no agreement, oral or otherwise, to pay bonuses and sick leave. Further, no extrinsic evidence of unfair conduct on the part of the employer. The sole basis for the Board holding as it did was that the act of not giving bonuses and sick leave in and of itself was in violation of the Act.

Simply stated, in the express absence of an agreement between the parties as to bonuses and sick leave, the Board has written that provision for the parties. Even though it has written it indirectly, nevertheless for all practical purposes it has written a portion of the contract for the parties.

We say that the Board cannot write a contract for the parties or compel the parties to agree to any provisions of a contract, directly or indirectly.

We submit that upon the record there is no evidence of any unlawful intent on the part of the company, and the conclusion of the Board that the company's disparate treatment inherently discouraged union membership is unwarranted and improper.

The order of the Board should be set aside and the Board's request for enforcement should be denied.

Respectfully submitted,

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